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JT INTERNATIONAL TOBACCO SDN BHD

v.

LAU THOW SIN

B

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[APPLICATION FOR JUDICIAL REVIEW NO: R1-25-154-2003]
28 FEBRUARY 2006

C ***ADMINISTRATIVE LAW:*** *Remedies - Certiorari, application for - To quash part of Industrial Court award - Backwages - Reinstatement - Practice Note No. 1 of 1987 - Whether Industrial Court erred in law*

D ***LABOUR LAW:*** *Employment - Dismissal - Application for certiorari to quash part of Industrial Court award - Backwages - Reinstatement - Practice Note No. 1 of 1987 - Whether Industrial Court erred in law*

This was an application by the applicant for an order of *certiorari* to quash part of the award in respect of the remedies awarded by the Industrial Court in Award No. 442 of 2003. The
E respondent, who had been dismissed from the applicant's service due to misconduct, challenged his dismissal under s. 20 of the Industrial Relations Act 1967 ('the Act'). The matter was referred to the Industrial Court, which held that the dismissal of the respondent was without just cause or excuse and ordered that the
F respondent be reinstated by the applicant without any loss of salary, promotion prospects and other benefits, monetary or otherwise. It was also ordered that the respondent be paid backwages and all other monetary benefits for the period from the date of his dismissal to the date of reinstatement. The applicant
G in this application sought to impugn only two parts of the award, namely: (i) the part of the award on backwages; and (ii) the part of the award on reinstatement.

Held (allowing the application):

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(1) In the present case, it was clearly established in the evidence that the respondent had obtained employment in another company for a period of time after his dismissal and was in receipt of income. The Industrial Court, however, proceeded
I to award full backwages to the respondent without making any adjustments. In fact, the Industrial Court made no reference to such evidence in its award. This was a serious

jurisdictional error on the part of the Industrial Court as it should have taken into account the fact that the respondent had been gainfully employed after his dismissal, and that, therefore, what he earned there should be taken into account when assessing the backwages awarded to him. Failure to do so was clearly an error of law.

(2) While the quantum of backwages is very much at its discretion, the Industrial Court, in exercising its discretion, must do so in accordance to the established principles of justice and fairness. The Industrial Court was duty-bound to examine all relevant factors that may have contributed to the completion of this case being delayed. It is for this reason and to avoid arbitrariness in the award of backwages that the Practice Note No. 1 of 1987 was formulated, which provides that the award of backwages is subjected to a maximum of 24 months. It is true that the Practice Note is merely a guideline and *per se* it is not wrong in law for the Industrial Court to award backwages exceeding the 24 months as mentioned in the Practice Note, but the Practice Note should only be disregarded when and if it can be proved that a company mainly contributed to the delay of disposing a case. In the instant case, the applicant was not solely responsible as the delays were due to several factors. Thus, it was unfair for the Industrial Court to award the respondent full backwages without limiting the same to 24 months. The circumstances of the delays were relevant matters that should have been taken into consideration. Clearly, in this case, the Industrial Court had failed to consider it and, hence, had committed an error of law.

(3) The present case was one of the rare cases where reinstatement should be refused. The respondent had held a high-ranking position as Human Resources Manager, which was a position of trust and confidence and would avail the respondent with the necessary confidential and sensitive matters relating to the applicant's personnel. Since the relationship of the respondent had turned sour due to a lack of mutual trust and confidence, it would not be appropriate for the Industrial Court to reinstate the respondent to his former position with the applicant. Furthermore, in light of the fact that the ownership of the applicant had changed hands, it would be unfair for the new owner and management to employ the respondent by the order of reinstatement.

A Therefore, it was not appropriate for the Industrial Court to reinstate the respondent to his former position; the proper remedy in this case was compensation *in lieu* of reinstatement.

[Matter referred back to Industrial Court for reassessment of backwages
B *and compensation in lieu of reinstatement.]*

Case(s) referred to:
Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 CA ***(refd)***
Dr James Alfred, Sabah & Anor v. Koperasi Serbaguna Sanya Bhd, Sabah
C *[2001] 3 CLJ 541 FC* ***(foll)***
Koperasi Serbaguna Sanya Bhd, Sabah v. Dr James Alfred, Sabah & Anor [2000] 3 CLJ 1758 CA ***(foll)***
Kumpulan Perangsang Selangor v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 FC ***(refd)***
D *Nestle Food Store Storage (Sabah) Sdn Bhd v. Terrence Tan [2002] 1 ILR 280* ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20, 30

E *For the applicant - N Sivabalah (Raymond TC Low with him); M/s Shearn Delamore & Co*
For the respondent - S Muhendaran (GS Kavitha with him); M/s Muhendaran Sri

Reported by Suresh Nathan

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JUDGMENT

Raus Sharif J:

[1] This is an application by the applicant for an order of
G *certiorari* to quash part of the award in respect of the remedies awarded by the Industrial Court in Award No. 442 of 2003, handed down on 28 June 2003.

[2] The facts leading to this application by the applicant may be
H summarised as follows.

[3] The respondent commenced employment with the applicant as its Human Resources Manager on 1 July 1995. Arising from several allegations of misconduct, the respondent was dismissed from the service of the applicant on 5 March 1998. The
I respondent challenged his dismissal under s. 20 of the Industrial Relation Act 1967 ("the Act"). The matter was referred to the Industrial Court.

[4] On 28 June 2003, the Industrial Court held that the dismissal of the respondent was without just cause or excuse and ordered the respondent be reinstated by the applicant without any loss in salary, promotion prospects and other benefits, monetary or otherwise. It was also ordered that the respondent be paid backwages and all other monetary benefits for the period from the date of his dismissal to the date of reinstatement.

[5] The applicant in this application is seeking to impugn only two parts of the award namely:

(a) part of the award on backwages; and

(b) part of the award on the reinstatement.

(a) Backwages

[6] It is the submission of the applicant that the award on backwages should be quashed and remitted back to the Industrial Court for reassessment because:

(i) The Industrial Court erred in law in failing to take into account the evidence that the respondent was gainfully employed after his dismissal.

(ii) The Industrial Court erred in law in failing to limit the backwages to 24 months when it failed to appreciate that the delay in the hearing of the matter was not solely caused by the appellant.

(i) Was The Respondent Gainfully Employed After His Dismissal

[7] It was clearly established in evidence that the respondent had obtained employment in another company for a period of time after his dismissal and was in receipt of income. The respondent in his evidence before the Industrial Court, during cross examination testified as follows:

> After my dismissal by the Company in March 1998, I did obtain employment in Olympia Holdings Bhd as Group Human Resources Manager, from September 1998 to August 2000. I started at RM8,500.00 and when I left, I was earning RM9,000.00 per month.

[8] It is contended by the applicant that despite the above evidence, the Industrial Court proceeded to award full backwages to the respondent without making any adjustment to the same as if the respondent was never employed after his dismissal. According to the appellant the Industrial Court's award on backwages was therefore flawed. In support of its contention the applicant cited the Court of Appeal's decision in *Koperasi Serbaguna Sanya Bhd, Sabah v. Dr. James Alfred, Sabah & Anor* [2000] 3 CLJ 1758 and the Federal Court's decision in *Dr. James Alfred, Sabah & Anor v. Koperasi Serbaguna Sanya Bhd, Sabah* [2001] 3 CLJ 541 (*Dr. James Alfred*'s case).

[9] Learned counsel for the respondent in his submission conceded that the Industrial Court was in error when failing to take into account that the respondent was gainfully employed after his dismissal. The concession by the learned counsel is commendable, as the law on this matter is well settled that an adjustment has to be made to an award of backwages when the workman has found other employment.

[10] The Court of Appeal in *Dr. James Alfred*'s case stated it as follows:

> What comes across quite clearly is that an adjustment should be made to an award of backwages where the workman has found other employment. The appellant has complained that no such adjustment was made by the Industrial Court in the present instance. I think the complaint is justified. It is a common ground that in August 1998, the respondent found himself other employment in Peninsular Malaysia. Yet the Industrial Court did not take into account when awarding the respondent his bakwages. It proceeded as though the respondent had not been employed elsewhere during the whole of the period in question. The award in respect of backwages is therefore flawed.

[11] Subsequently, on appeal, the Federal Court said it in the following words:

> In our view, it is in line with equity and good conscience that the Industrial Court, in assessing the quantum of backwages should take into account the fact, if established by evidence or admitted that the workman has been gainfully employed elsewhere after his dismissal. Failure to do so constitutes a jurisdictional error of law, *certiorari* will therefore lie to rectify it.

[12] In the present case, it was clearly established in evidence that the respondent had obtained employment in another company for a period of time after his dismissal and was in receipt of income. But the Industrial Court proceeded to award full backwages to the respondent without making any adjustment. In fact the Industrial Court made no reference to such evidence in its award. To me, this is a serious jurisdictional error on the part of the Industrial Court. As enunciated by the Court of Appeal and Federal Court in *Dr. James Alfred*'s case, the Industrial Court ought to take into account the fact that the respondent has been gainfully employed after his dismissal and therefore what he earns there should be taken into account when assessing the backwages awarded to him. Failure to do so is clearly an error of law and *certiorari* will therefore lie to rectify it.

(ii) Failing To Limit The Backwages 24 Months

[13] In the award, the Industrial Court directed that the respondent be paid backwages and all other monetary benefits for the period from the date of his dismissal to the date of reinstatement. The respondent was dismissed on 5 March 1998. The award was handed on 28 June 2003. As at the date of the award, the respondent stands to be awarded backwages up to 63 months.

[14] It was contended by the appellant that the Industrial Court had erred in law in awarding full backwages to the respondent when it failed to appreciate that:

(i) the applicant was not the sole party to be blamed for the delay;

(ii) the case was delayed when a new chairman took over the case and heard the matter *de novo* in 2000; and

(iii) there was a further delay by the court in handing down its decision on the matter.

[15] It is not in dispute that there has been a considerable delay on the part of the Industrial Court in the completion of this case. The case was originally fixed before Industrial Court Chairman Mr. Tan Kim Siong. On 29 December 1998, the court fixed the matter for hearing on 30 June 1999 and 1 July 1999. The court then vacated 30 June 1999 and started hearing the case on 1 July 1999. The matter was the fixed for continue hearing on the 6 and

A 7 December 1999. The aforesaid dates were, however, vacated at the applicant's request. The matter was re-affixed for hearing de novo for 14 and 15 August 2000 before another Chairman Mr. John Louis O'hara, as the previous Chairman has retired. The matter was heard on 14 August 2000. However, the hearing on
B 15 August 2000 was vacated as the respondent's counsel was taken ill.

[16] The next date for continued hearing was fixed for 9 and 14 October 2000. The matter was however postponed to 5 and 6
C February 2001 as the applicant's principal witness was not available. The hearing proceeded on 5 and 6 February 2001. The matter was fixed for continued hearing on 27 March 2001. The said date was however vacated by the court. The court then fixed 6 July 2001 for continued hearing. The said date was vacated as
D the respondent's counsel was unwell.The matter was subsequently heard on 28 September 2001 and completed on 1 October 2001. Written submissions were filed by the parties as early as 7 May 2002. However, the learned Chairman only handed down the award on 28 June 2003.

E **[17]** Hence, it is the contention of the applicant that it should not be punished with an excessive backwages when it is not responsible for the delays. The respondent on the other hand contended that the question of quantum of backwages is very much at the discretion of the Industrial Court to fix in line with
F s. 30 of the Act.

[18] With respect, while I agree that the quantum of backwages is very much at the discretion of the Industrial Court but I am of the view that the Industrial Court in exercising its discretion must
G do so in accordance to established principles of justice and fairness. The Industrial Court is duty bound to examine all relevant factors that may have contributed to the delays in completion of this case. I believed it is for this reason and to avoid arbitrariness in the award of backwages that the Practice
H Note No. 1 of 1987 was formulated which provides that the award of backwages is subjected to a maximum of 24 months.

[19] The formula of awarding backwages subject to a maxim of 24 months has long been applied by the Industrial Court. The
I rational of limiting the quantum of backwages to 24 months has been well reasoned by Industrial Court Chairman Mr. Lim Heng

Seng in *Nestle Food Store Storage (Sabah) Sdn. Bhd. v. Terrence Tan* [2002] 1 ILR 280. The learned Chairman in that case stated as follows:

> The court is of the opinion that the basic approach that a workman held to have been dismissed without just cause should be awarded backwages subject to a maximum of 24 months is long established and that there will be undue violence to the existing process of awarding and assessing backwages were some other formula to be applied save in exceptional cases. More importantly, however, the court is of the view that subject to some observations and consequential modifications set out hereinafter, it represents a just and equitable formula for awarding backwages. The court thinks that the formula for awarding backwages provides a workable basis for assessing and awarding a workman's backwages in a sensible and fair way taking into consideration various relevant factors *inter alia*, his loss of wages, the duty to mitigate and the onus and burden of proof.
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> The prescription of the multiplier of 24 months strikes a right balance between the interests of the parties. It takes into account a realistic and reasonable time frame for the workman to recover from the setback of his dismissal and to be restored to his earning capacity prior to his dismissal. It also takes into account the justifiable concern that delays in the statutory processes of conciliation, reference and adjudication should not inflate the quantum of backwages awarded and unduly penalise employers by exorbitant awards which have no rational relationship or nexus between loss and liability. The formula affords the workman a monetary award of backwages which is fair and adequate for the loss of the earnings arising from his dismissal.

[20] I am in agreement with the above observation. It is true that the practice note is merely a guideline and *per se* it is not wrong in law for the Industrial Court to award backwages exceeding the 24 months as mentioned in the practice note, but to me, the practice note should only be disregarded when and if it can be proved that the delay in disposing a case is mainly contributed by the company. In the present case, the applicant was not solely responsible for the delays. The delays were due to several factors which the applicant could not be said as the main contributing factor. Thus, it was unfair for the Industrial Court to award the respondent full backwages without limiting the same to 24 months. The circumstances of the delays are relevant matters that must be taken into consideration. Clearly in this case the Industrial Court had failed to consider it and thus committed an error of law and *certiorari* will lie to rectify it.

A **(b) Order Of Reinstatement**

[21] It is the contention of the applicant that the order of reinstatement was incompatible to the factual circumstances of this case. The applicant contended the respondent held a high ranking
B position as the Human Resources Manager. The position, according to the applicant, is a position of trust and confidence as it would avail the respondent with the necessary confidential and sensitive matters relating to the personnel of the applicant. The respondent on the other hand contended that reinstatement
C is the usual remedy and that it is only in the rare cases that the said remedy is refused.

[22] What is contended by the respondent is a well established principle. Gopal Sri Ram JCA in *Koperasi Serbaguna Sanya Bhd v. Dr. James Alfred* [2000] 3 CLJ 758 stated:
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> In Industrial law, the usual remedy, for unjustified dismissal is an order for reinstatement. It is only in rare cases that reinstatement is refused for example where the relationship between the parties has broken down so badly that it would not be conducive to
E industrial harmony to return the workman to his place of work.

[23] To me, the present cases is one of the rare case where reinstatement should be refused. In *Kumpulan Perangsang Selangor v. Zaid bin Hj. Mohd Noh* [1997] 2 CLJ 11 the Supreme Court expounded several principles relating to the remedy of
F reinstatement and elaborated on the necessary considerations ought to be take into account by the Industrial Court in deciding whether an order of reinstatement should be issued. At p. 33 the Supreme Court held as follows:

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> Having decided that this court has the jurisdiction and the power to grant relief to the respondent, all that remained was to determine the nature of the relief that ought to be granted. The principles that govern the relief that is to be awarded in cases of this nature are sufficiently set out in *Malhotra's The Law of*
H *Industrial Disputes* (4th Ed) Vol 2 p 942:
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> > From the decided cases, no hard and fast rule of universal application is discernible as to which circumstances would, in a given case, constitute an exception to the general rule of reinstatement. The Labour Appellate Tribunal in
> I *Buckingham and Carnatic Mills*' case [1951] 2 LLJ 314 stated that 'the past record of the employee, the nature of his alleged present lapse and the ground on which the order

of management is set aside' are some of the relevant factors for consideration. The conduct of the workman is also a vital factor to be taken into account by the tribunal before ordering reinstatement. In this connection, expressing himself in rather vehement language, a single judge of the Calcutta High Court said, 'supposing the tribunal comes to the conclusion that the employee is a rogue or a black guard or a thoroughly incompetent one, unable to perform his job, it is ridiculous to suggest that such matters are irrelevant and the tribunals must still reinstate the worker and shut their eyes to the real state of things' (see *Hukumchand Jute Mills Ltd v. Labour Appellate Tribunal* [1959] 1 LLJ 595). Trustworthiness of the worker is one of the important factors to be taken into account. The nature of the relations between the employer and the employee is also a relevant factor to be taken into consideration. The tribunal is also to safeguard the interests of the employer including the consideration of discipline in the establishment. The nature of the duties performed by the employee and the nature of the industrial establishment employing him is also a relevant consideration. These cases are merely illustrative where an exception to the general rule of reinstatement is to be made. No comprehensive rule as to which circumstances would in a given case constitute an exception to the general rule can possibly be laid down. In each case, keeping the objectives of industrial adjudication in mind, and in a spirit of fairness and justice, the tribunal has to deal with the question whether the circumstances of the case require that an exception should be made and compensation would meet the ends of justice. If, on taking these principles and the relevant factors into consideration, the tribunal comes to the conclusion that reinstatement would not be desirable or expedient in the circumstances of the case, it may award compensation instead of reinstatement to the workman in spite of the fact that his discharge or dismissal was invalid owing to some infirmity in the impugned order.

[24] In the above case, the Supreme Court took into account the fact that the dismissed employee held a high ranking position and ruled that reinstatement was not an appropriate remedy. Instead the court granted compensation in lieu of reinstatement to the employee.

[25] Similarly, in *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79, the Court of Appeal reiterated the same principle and made the following observations:

A In his statement of case, the respondent has asked for reinstatement. This is the usual remedy that is to be awarded in industrial law. But there may be circumstances where the reinstatement is inappropriate. This is such a case.

B The respondent was in a managerial position. The circumstances in which he left the appellant show that mutual trust is lacking. After he was dismissed, he joined a stockbroking firm. No useful purpose will be served from uprooting him from his present place of work and thrusting him upon the appellant. Taking into account all the facts and circumstances of the case, we are of the view C that the proper remedy in this case is compensation in lieu of reinstatement.

[26] Similarly in this case, the respondent held a high ranking position as Human Resources Manager. This is a position of trust and confidence and would avail the respondent with the necessary D confidential and sensitive matters relating to the personnel of the applicant. From the facts of this case, the relation between the applicant and the respondent had turned sour due to lack of mutual trust and confidence. Thus, it would not be appropriate for the Industrial Court to reinstate the respondent to his former E position with the applicant.

[27] Moreover as established by evidence, that in 1999, the business of ownership of the applicant was acquired by Japan Tobacco Inc. In light of the fact that the ownership of the F applicant had changed hands, it would be unfair for the new owner and management to employ the respondent by the order of reinstatement. This is in consonance with the principle in *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj. Mohd Noh* [1997] 2 CLJ 11 where the Supreme Court held:

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Taking into account all relevant circumstances, including the fact that the respondent in the instant appeal performed an executive function in a recreational club, we came to the conclusion that reinstatement is not an appropriate remedy. Further, we were informed by Mr. Sivabalah that the ownership of the club has H changed hands. In these circumstances it would, in our judgement, be unjust to compel the new management to employ the respondent.

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[28] For the above reason, it is my view that it is not appropriate for the Industrial Court to reinstate the respondent to his former position. To me, the proper remedy in this case is compensation *in lieu* of reinstatement.

[29] Accordingly, the applicant's application is allowed with costs. The matter is referred back to the Industrial Court for reassessment of backwages and the compensation *in lieu* of reinstatement.